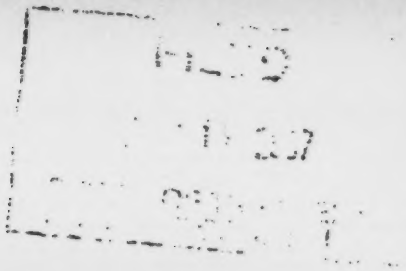

No. 06-1312

In the Supreme Court of the United States

JOSE JAVIER AVALOS-GUTIERREZ, PETITIONER

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

GENE C. SCHAERR
MICHAEL BHARGAVA
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

LINDA T. COBERLY*
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

* *Counsel of Record*

Counsel for Petitioner

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Government does not dispute that under *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006), Petitioner Jose Javier Avalos-Gutierrez would be entitled to pursue cancellation of removal—a right he was denied by the Board of Immigration Appeals. It also does not dispute that his appeal was dismissed through a clerical error, or that the Fifth Circuit has repeatedly refused to correct that error without explanation. And the Government no longer defends the reasons it gave the Fifth Circuit in support of rejecting Mr. Avalos-Gutierrez's motion to reopen this case more than a year ago.

Under the circumstances, none of the Government's current arguments can justify the Fifth Circuit's refusal to recall the mandate in this case. In light of *Lopez*, this Court has already granted, vacated, and remanded dozens of cases that were pending in the Fifth Circuit concurrently with this one—including one of the very cases on which the Government's Fifth Circuit arguments relied. See Pet. 11 & App. A. This case should be treated no differently.

1. A grant of relief in this case would not "circumvent normal rules of finality," as the Government contends. Opp. 4. Far from it. The Fifth Circuit's own cases provide that a recall of the mandate is necessary to avoid injustice where a subsequent Supreme Court decision renders a Fifth Circuit decision "demonstrably wrong" or creates a "danger of incongruent results in cases pending at the same time." *United States* v. *Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) (quoting *American Iron & Steel Inst.* v. *E.P.A.*, 560 F.2d 589, 594 (3d Cir. 1977)). This proposition holds even when the litigant seeking recall of the mandate did not make *any* effort to seek certiorari or otherwise keep his case open pending the Supreme Court's decision.

See *ibid.*; Pet. 12 n.4. Here, it is undisputed that the Fifth Circuit's refusal to hear and grant relief in the appeal was "demonstrably wrong" in light of *Lopez* and that its refusal to recall the mandate leaves "incongruent results in cases pending at the same time." 116 F.3d at 120.

This injustice is amplified by the extraordinary errors that infected the Fifth Circuit's consideration of this case from the beginning—errors that represent a dramatic departure from the usual and accepted course of judicial proceedings. Sup. Ct. R. 10(a). As the Petition explains, this appeal was dismissed through an apparent clerical error. Pet. 4-5. Then, following the initial dismissal, the Fifth Circuit apparently accepted the Government's argument that it could simply decline jurisdiction (and thus keep the appeal dismissed) on the ground that the petitioner's position on the central issue—whether a state-court conviction for simple possession was an aggravated felony for purposes of the immigration laws—was not "colorable" in the Fifth Circuit. Pet. 5. Since then, the Government has conceded (as it must) that the REAL ID Act "definitively resolved" the question of the courts of appeals' jurisdiction over cases like this one. Pet. 6-7. Thus the Government has now abandoned the very argument offered to (and apparently accepted by) the Fifth Circuit. It is now undisputed that a court of appeals cannot simply decline jurisdiction over an immigration case based on its doubt about whether the appeal will succeed on its merits.

Moreover, even if it had been appropriate for the Fifth Circuit to decline jurisdiction on that basis, the court's apparent conclusion that the appeal was not "colorable" was flatly wrong then and remains wrong now. Even at that time, other circuits had resolved the "aggravated felony" question differently from the Fifth Circuit, and several petitions for certiorari were pending in this Court to resolve the conflict among the circuits—*with* the Solicitor General's acquiescence. Pet. 5. Despite these facts—fully

briefed in connection with the motion to reopen the case—the Fifth Circuit still refused to allow the appeal to proceed. *Ibid.* Then, on the very same day as the Fifth Circuit's order refusing to reopen the instant case, this Court granted certiorari in *Lopez*—thus casting the Fifth Circuit's precedents further in doubt. *Ibid.* But when Mr. Avalos-Gutierrez promptly brought the grant of certiorari to the Fifth Circuit's attention in an unopposed motion, the Fifth Circuit inexplicably refused to docket it. Pet. 6. Later efforts to reopen the case in light of the Government's changed position on the jurisdictional issue were also unsuccessful. Pet. 6-7.

The fact that the time to seek certiorari in this case passed before the decision in *Lopez* was rendered should not have barred relief in the Fifth Circuit and should not affect the disposition of this Petition. As noted above, normal rules of finality allow a court of appeals to recall its mandate to avoid injustice based on a subsequent Supreme Court decision, even if the movant made no effort at all to seek certiorari or otherwise to keep the case open. Here, Mr. Avalos-Gutierrez and his counsel have worked mightily to keep his case open. Pet. 5-7. Indeed, the Government does not dispute that when the filing deadline passed, the parties were awaiting a ruling from the Fifth Circuit on an *unopposed* motion to hold the case open pending this Court's decision in *Lopez*. The outcome in this case cannot turn on the fact that Mr. Avalos-Gutierrez—having filed a motion to hold the case open *with the Government's consent*—did not also file a "me too" petition for certiorari from the dismissal to raise an issue that this Court had already agreed to review. Nothing in the rules of finality compels such a result. See Pet. 12 n.4 (discussing Fifth Circuit cases providing that a recall of the mandate is necessary to remedy the incongruity that results when, as here, a timely petition for certiorari is filed in one case but not in another, concurrent case).

The Government's reliance on *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (Opp. 3), is misplaced. In that case, Congress attempted to reopen cases that had been finally dismissed with prejudice so that litigants could take advantage of new legislation. This Court properly rejected that effort as a violation of separation of powers. That case did not speak to whether a mandate should be recalled when the Supreme Court vacates and remands the very precedent on which the lower court apparently relied in denying relief. And in any event, the law applicable to this case has not changed. The only change is in the Fifth Circuit's faulty interpretation of that law—a change that would unquestionably apply here if the Fifth Circuit had followed the ordinary course of judicial proceedings. See *Gonzalez-Gonzalez* v. *Weber*, 472 F.3d 1198 (10th Cir. 2006) (*Lopez* applies retroactively; "[C]ases interpreting statutes are 'fully retroactive because they do not change the law, but rather explain what the law has always meant.'") (citations omitted).*

For all these reasons, even setting aside the tension between the result in this case and *Lopez*, the Fifth Circuit's handling of this case from the beginning has indeed "far departed from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). See Opp. 4-5. Under the extraordinary circumstances in this case, the Fifth Circuit's refusal to recall the mandate and apply this Court's decision in *Lopez* cannot be allowed to stand.

2. The Government's argument about Mr. Avalos-Gutierrez's reentry has no place in these certiorari pro-

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* The interest in finality is not as irrefutable as the Government suggests. This court has long recognized that judgments can and sometimes must be disturbed even years after they become final. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (reversing the Third Circuit's refusal to recall its mandate twelve years after a decision had been rendered final, based on a showing of injustice resulting from a later-revealed fraud on the court).

ceedings. The issue before the Fifth Circuit (and this Court) is whether, under the statute, Mr. Avalos-Gutierrez is entitled to *pursue* cancellation of removal. Under *Lopez*, the answer is yes. Indeed, the Government does not contend (nor could it) that Mr. Avalos-Gutierrez's misdemeanor conviction for illegal reentry is a barrier to his application for cancellation. Pet. 13.

Whether Mr. Avalos-Gutierrez ultimately *receives* cancellation of removal is a question to be decided in the first instance by an Immigration Judge, in light of all the evidence presented by the parties. Pet. 13-14. As the Petition explains, that evidence would reveal Mr. Avalos-Gutierrez's more than 20 years of productive life and work as a legal permanent resident in Texas, his extended family in the area, and his U.S. citizen children. It would also show his successful completion of probation and a drug education program following his state deferred-adjudication conviction for possessing less than one gram of cocaine—a conviction for which he served no time and which he is now entitled under state law to have expunged from his record. *Ibid.*

The injustice here derives from the fact that Mr. Avalos-Gutierrez was denied the right to present his case for cancellation—a right that he was undeniably granted by Congress under the Immigration and Nationality Act, as interpreted by *Lopez*. See 8 U.S.C. § 1229b(a)(3). This Court's intervention is required to ensure the Fifth Circuit's fidelity to *Lopez* and to correct the extraordinary series of errors in this case that took the Fifth Circuit far from the accepted and usual course of judicial proceedings.

* * *

Petitioner respectfully asks that the petition for a writ of certiorari be granted, the Fifth Circuit's order vacated, and the case remanded to the Fifth Circuit for further consideration in light of this Court's decision in *Lopez*. Alter-

natively, Petitioner asks that the Court grant the petitior and set the case for plenary review.

Respectfully submitted.

GENE C. SCHAERR
MICHAEL BHARGAVA
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

LINDA T. COBERLY*
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

* *Counsel of Record*

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